



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-533

JESS H. HISQUIERDO,
Petitioner

v.

ANGELA HISQUIERDO

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF OF PETITIONER

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OPINION BELOW

The opinion below on the original decision is reported at 19 C.3d 613, 139 Cal. Rptr. 590, 566 P.2d 224.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), on the ground that California's statutes dealing with division of community

property upon divorce is repugnant to those rights set up under the Railroad Retirement Act.

The order reviewed herein was made and entered on July 12, 1977. The petition for writ of certiorari was filed on November 11, 1977. This Court granted certiorari on April 24, 1978.

STATUTORY PROVISIONS INVOLVED

(a) California Civil Code § 687: "Community property is property acquired by husband and wife, during marriage, when not acquired as the separate property of either."

(b) California Civil Code § 4800: "...the court shall, either in its interlocutory judgment of dissolution of the marriage ... divide the community property and the quasi-community property of the parties ... equally."

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(c) 45 U.S.C. § 231m: "Notwithstanding any other law of the United States, or of any state, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment or other legal process under any circumstances whatsoever, nor shall payment thereof be anticipated."

(d) 45 U.S.C. § 231d(c)(3)(B): "The entitlement of a spouse of an individual to an annuity under section 231a (c) of this title shall end on the last day of the month preceding the month in which ... the spouse and the individual are absolutely divorced..."

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is any property, community or otherwise, right to the future entitlement of Federal Railroad

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Retirement benefits.

2. Whether a spouse divorced from an employee of a railroad connected occupation is entitled to any benefits under the Railroad Retirement Act.

3. Whether the purpose of the Railroad Retirement Act precludes a divorced spouse from any entitlement to a portion of the railroad connected ex-spouse's future benefits.

STATEMENT OF THE CASE

The parties to this matter were married in 1958 and separated in 1972. Both of the parties were employed throughout their marriage. Petitioner, Husband, was employed in a railroad connected occupation, and may be entitled to benefits under the Railroad Retirement Act upon reaching the eligible age set forth in 45 U.S.C. § 231(a). At the same

time the Wife will be entitled to Social Security benefits arising by reason of her employment.

In the case below, Wife contended that she was entitled to share in her Husband's future Railroad Retirement benefits. The trial court held that there was no such entitlement on her part. The California District Court of Appeals affirmed, but the California Supreme Court reversed.

Petition for writ of certiorari was filed before this Court and on April 24, 1978 this Court granted certiorari.

SUMMARY OF ARGUMENT

I. THERE IS NO PROPERTY RIGHT TO THE FEDERAL RAILROAD RETIREMENT ACT BENEFITS.

Where the state courts incorrectly adjudge a federal right, this Court can

review the error.

It is well settled in California, that any community property rights to a pension benefit arises solely by reason of there being a contractual right thereto. Both with respect to social security benefits and with respect to railroad retirement benefits there can be no contractual rights. These "social insurance" or "welfare" benefits are purely a creation of statute. The state courts, therefore, have no right to deal with such benefits as if they were community property rights.

II. A SPOUSE DIVORCED FROM AN EMPLOYEE OF A RAILROAD CONNECTED OCCUPATION IS NOT ENTITLED TO ANY BENEFITS UNDER THE RAILROAD RETIREMENT ACT.

The Court has spoken with clarity, that where there is a conflict between

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the federal law and the state law, the state law must yield.

The Railroad Retirement Act establishes the rights not only for the individual, who has worked in a railroad connected occupation, but also for the spouse and widow or widower. The Act is also specific that the rights of a divorced spouse are terminated. To hold that under state law a divorced spouses rights are not terminated, but that a spouse is still entitled to some portion of the employed spouses rights is in clear conflict with the federal law, and the state law must yield.

III. THE PURPOSE OF THE RAILROAD RETIREMENT ACT PRECLUDES A DIVORCED SPOUSE FROM ANY ENTITLEMENT TO ANY PORTION OF THE RAILROAD EMPLOYED SPOUSES FUTURE BENEFITS.

The purpose of the Railroad Retirement Act was to do away with the

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frequency of the tragic sequence of old age, disability, loss of earning power, destitution, and dependency on charity. To allow a divorced spouse the right to a portion of the ex-spouse's annuity, runs contrary to the express intent of Congress to terminate any annuity upon divorce and frustrates the purpose of the Act to do away with the tragic sequence herein set forth.

ARGUMENT

INTRODUCTION

The trial court below correctly held that there were no community property rights to Petitioner's future entitlement to railroad retirement benefits. The California Supreme Court, however, incorrectly adjudged the federal rights to be community property and in so doing has failed to recognize

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that where the federal law and state law conflict, the state law is the one that must yield.

POINT I

THERE IS NO PROPERTY RIGHT, COMMUNITY OR OTHERWISE, TO THE FUTURE ENTITLEMENT OF FEDERAL RAILROAD RETIREMENT ACT BENEFITS.

During a proceeding for the dissolution of marriage (divorce), the trial court is obligated to divide the community property equally. California Civil Code § 4800. Community property is defined by California Civil Code § 687 to be "that property acquired by husband and wife, during marriage, when not acquired as the separate property of either."

The California Supreme Court has found some pension benefits to be community property. When it has done

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so, its opinion has been based on the fact that the "right to receive a pension ... is an element of her husband's contractual compensation and is earned by performance of services."

Benson v. City of Los Angeles (1963)

60 C.2d 355, 359, 33 Cal. Rptr. 257, 384 P.2d 649.

The California Supreme Court has also found that pension benefits represent a form of deferred compensation for services rendered and therefore are a "contractual right, derived from the terms of the employment contract." Based on such contractual right, such benefits are a form of property. In re Marriage of Brown (1976) 15 C.3d 838.

"It is now well settled in this State (California) that in order to qualify as a divisible community asset,

an interest must be a contractual right or a property right. A pension right becomes a property interest when the employer cannot unilaterally repudiate the right." In re Marriage of Nizenkoff (1976) 65 C.A.3d 136, 135 Cal. Rptr. 189

Just as the social security tax is imposed on the payroll of employees (26 U.S.C. § 3101), so is the railroad tax imposed on railway connected employees (26 U.S.C. § 3201). The proceeds of the tax are paid to the United States Treasury. Each year an amount equal to the benefits, that are expected to be paid out, is appropriated to a Trust Fund. 45 U.S.C. §§ 231f, 231n; Fleming v. Nestor (1960) 363 U.S. 603, 609, 80 S. Ct. 1367. Thus, neither the social security system nor the railroad retirement system contain any contractual

al elements.

This Court described the social security system as a method of "social insurance" whereby those who are presently employed are taxed in order to pay the benefits to those who are currently retired or disabled. The right is purely statutory. There is no contractual interest. Fleming v. Nestor, *supra*, pp. 609-610.

The rights under the Railroad Retirement Act are likewise purely statutory with no contractual elements attributable thereto. Ruhl v. Railroad Retirement Board, 342 F.2d 662; certiorari denied 382 U.S. 836, 86 S. Ct. 81 (1965).

While this Court does not have the power to review errors of state law, it does have the power to review state

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judgment "to the extent that they incorrectly adjudge federal rights." Herb v. Pitcairn (1944) 324 U.S. 117, 126.

In Richardson v. Belcher (1971) 404 U.S. 78, 880-81, this Court stated with respect to social security benefits that an expectation of public benefits does not confer a contractual right. (see also Weinberger v. Wiesenfeld (1974) 420 U.S. 636, 646)

Based on the foregoing reasoning, the rule of law in California is, that there being no contractual rights to social security benefits, there is no community property rights. In re Marriage of Nizenkoff, *supra*. Yet, misconstruing the federal benefits created under the Railroad Retirement Act, the California Supreme Court held

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that there are community property rights to such benefits.

POINT II

A SPOUSE DIVORCED FROM AN EMPLOYEE OF A RAILROAD CONNECTED OCCUPATION IS NOT ENTITLED TO ANY BENEFITS UNDER THE RAILROAD RETIREMENT ACT.

Whenever there is a conflict between federal law and state law, the state law must yield. Wissner v. Wissner (1950) 338 U.S. 655.

Wissner itself arose out of a California case in which the widow sought to assert community property rights to a National Service Life Insurance (NSLI) policy. Congress expressed its intent that the NSLI insured shall have the right to designate the beneficiary. The Court also held that the California judgment

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is deficient in that it would divert the future payments as soon as they are paid, since such is in flat conflict with the exemption provision, to wit, the payments "shall be exempt from claims of creditors, and shall not be liable to attachment, levy, seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary..." (38 U.S.C. 816)

Similar provisions are found in the Railroad Retirement Act. The rights of the individual, spouse and widow or widower are all set forth with clarity under the Act. (45 U.S.C. §§ 231 et seq.) Additionally, the Act is quite clear that the divorced spouse has no rights to an annuity. (45 U.S.C. 231d(c)(3)(B)). Congress,

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therefore, has created all rights, both during and after the marriage. To allow the spouse an ownership interest in the annuity payments, or an interest of equal value in other assets owned by the parties, upon divorce would be a diversion of the future payments in direct conflict with the exemption provision set out in 45 U.S.C. §231m.

Furthermore, any holding that there exists a community property ownership interest to the railroad connected employee's annuity, after the spouses annuity has been lost by an absolute divorce, is in direct conflict with the federal law, and such determination of a community interest must yield.

POINT III

THE PURPOSE OF THE RAILROAD RETIREMENT ACT PRECLUDES A DIVORCED SPOUSE FROM ANY

ENTITLEMENT TO ANY PORTION OF THE EMPLOYED SPOUSES FUTURE BENEFITS.

It must not be forgotten that when the Railroad Retirement Act was first enacted in 1935, and its counterpart the Social Security Act, this Country had ample opportunity to observe the "frequency of the tragic sequence of old age, disability, loss of earning power, destitution and dependency on public or private charity." The purpose of the Act has as its foundation "to avert the personal hazards and social problems which often attend old age."

70 Am. Jur.2d 716-717.

The purpose of the Act is to not only improve the relationship between employers and employees, but also to allow employees to be able to retire with peace of mind and physical comfort.

Retirement System for Employees of
Carriers Subject to Interstate Commerce
Act. H.R. Rep. No. 1711, 74th Cong.,
1st Sess. (1935).

Congress in enacting the Railroad Retirement Act specifically provided for benefits to the individuals, their spouses and widows and widowers. 45 U.S.C.
231a, 231c.

Congress also made it clear, that as to the divorced spouse, any entitlement to an annuity shall terminate when the spouse and the railroad connected employee are absolutely divorced. 45 U.S.C.
231d(c)(3)(B).

To allow the community property system to take away as much as half of the retiring employee's income upon divorce is to destroy the very purpose for which the Act was passed and runs

contrary to the expressed intent of Congress. The rising cost of living due to our present inflation already places many of our senior citizens on the mere subsistence level when they receive their full benefits. To take away as much as half of those benefits is to reduce our divorced elderly population below the subsistence level. The result is a return to the destitution, despair and dependency on charity and its accompanying loss of self-esteem. Clearly to allow such to happen is in direct contravention to the intent of Congress.

By the foregoing argument, it is not the within counsel's intent to imply that the divorced spouse should be left destitute. To the contrary, the trial courts will always have the right to rely on the financial resources, inclu-

ding the railroad retirement annuity, to determine the ability of the individual to pay spousal support (alimony) to the divorced spouse. Thus, the division could be meted out with judicial discretion based on ability and need and not arbitrarily by a precomputed formula based on the length of marriage and railroad connected service.

As an example, the Petitioner's wife, will have all of her social security benefits (based on In re Marriage of Nizenkoff, *supra*) and a substantial portion of Petitioner's railroad retirement benefits. Whereas, the Petitioner will be left with less than the full sum of his retirement annuity. The inequity and frustration of the Congressional intent is obvious.

SUMMARY

To allow the community property states to impress an ownership right to railroad connected employees' benefits upon divorce, despite the loss of all rights thereto upon absolute divorce, runs contrary to the federal law and the law set forth by this Court. More importantly, to allow such will also in effect destroy the very purpose for which the Act was created.

CONCLUSION

THIS COURT SHOULD REVERSE THE JUDGMENT BELOW RENDERED BY THE CALIFORNIA SUPREME COURT, AND AFFIRM THE JUDGMENT RENDERED BY THE TRIAL COURT.

Respectfully submitted,

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